No. 12,769

IN THE

United States Court of Appeals

For the Ninth Circuit

CLARENCE C. CAMINOS,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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I.

Answering appellant's argument in support of Specification of Error No. 1 that the court erred in holding that evidence of separate and independent crimes of bribery were admissible, appellee argues:

That evidence of other bribe payments was introduced by the appellant during the cross-examination of William Clark. (Terr. Ans. Br. p. 5.)

The questions put to the prosecution's witness Clark on cross-examination were limited to bribes taken by Clark, and by no question on cross-examination was

it attempted to show that defendant had or did not have, any connection with such bribes.

Appellee predicates its argument on this point on its assertion on page 7 of its Answering Brief that the quoted portion of the cross-examination of William Clark (found also on pp. 78-80 of the printed Transcript of Record) "* * * established the further fact that defendant Caminos, like Clark, was also receiving regular bribe payments from Paul Au and from other Honolulu gamblers."

A perusal of the testimony referred to shows that appellee's assertion by way of premise upon which to base its argument is false. In the cross-examination referred to the reference to "bribe payments from Paul Au and from other Honolulu gamblers" is limited to payments to Clark and no reference whatsoever is made to payments to defendant by Paul Au and other Honolulu gamblers. True, Clark answered to a question on cross-examination as to how much he (Clark) got from a gambler known as Small Snake, and volunteered the statement, not in response to any question, that of the amount he received, the defendant got $2,500.00 "and the other goes to the boys," who the boys were not being shown nor is it shown that they had any connection with the defendant.

The court's attention is again respectfully invited to the cross-examination of William Clark appearing on pages 78 to 80 of the Transcript of the Record and quoted in appellee's brief on pages 5 to 7 and

which forms the basis for appellee's argument that evidence of separate and independent crimes of bribery was admissible.

The evidence sought by the cross-examination of Clark was limited to crimes committed by him and hence could not be made the basis for adducing evidence of other bribery payments particularly the direct evidence given by the prosecution's witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tantog, and Priopios.

V.

Answering appellant's argument in support of Specification of Error No. 5, that the court erred in the giving of the following instruction:

> "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to acomplish an end, this is against him and you may take such action as the basis of presumption of guilt." (See Transcript of Record pp. 180-181.)

appellee argues that the Supreme Court "once again reaffirmed the long-established precedent firmly em-

bedded in the criminal jurisprudence of the Territory of Hawaii" and "confirms the legality of it."

It is respectfully submitted that appellee's assertion that the giving of the instruction in question in cases such as the case at bar is a "long-established precedent firmly embedded in the criminal jurisprudence of the Territory of Hawaii" is wholly without foundation.

This instruction had been before the Supreme Court of the Territory of Hawaii exactly four times before the instant case:

1. *Territory v. Truslow,* 27 Haw. 109;
2. *Territory v. Wong,* 30 Haw. 819;
3. *Territory v. Young,* 32 Haw. 628; and
4. *Territory v. Abellana,* 38 Haw. 533.

None of those cases is a case of (to use the language of Mr. Chief Justice Peters in *Territory v. Truslow, supra*) "mere conflict in the evidence." But each was a case in which (to again quote from the opinion written by Mr. Chief Justice Peters in the *Truslow* case) "the defendant did not limit himself to a mere denial of his acts as shown by the evidence but, out of whole cloth, the defendant fabricated a story."

The following will serve to show the kind of case submitted by the defendants which called forth the instruction now under consideration:

In *Territory v. Truslow,* 27 Haw. 109, as gleaned from the opinion of the court delivered by Mr. Chief Justice Peters beginning on page 112, the official report of the "fabricated defense" which gave rise to the giving of the instruction which was almost word for word the instruction complained of in the case at bar and now under consideration was as follows:

> "* * * At the close of the prosecution's case there was no evidence tending directly or indirectly to show that the contract of July, 1920 had been modified or revoked. On the contrary, the evidence was susceptible of but the one inference,—that on April 11, 1921, at the time that the balance of the Olaa stock was sold by the defendant, the authority previously conferred had been neither modified nor revoked but was in full force and effect and that the stock had been sold contrary to the instructions given in respect thereto and without the consent and against the will of the owner, Manuel Branco." (p. 113.)

The evidence further showed that the owner of the stock having died subsequent to the unauthorized sale of the stock in question, the defendant, acting as executor, filed a sworn inventory showing the stock as part of the assets of the estate notwithstanding the same had been sold by the defendant in the lifetime of the owner without the owner's having been notified of the sale which had taken place months before his death.

The defendant did not limit himself to a mere denial of his acts as shown by the evidence but, out of whole cloth, the defendant fabricated as his defense a story to the effect (quoting from page 112 of the decision of the Supreme Court of Hawaii)

> "* * * that the original authority to sell of July, 1920 was modified by Branco on March 29, 1921, the limitation upon the selling price of the stock having been then removed by him and the defendant authorized to sell at such price as he, in his judgment, should deem advisable,—later, however, if the price of Olaa went lower, to buy in again to the same amount."

Said the court, through Mr. Chief Justice Peters (p. 118):

> "* * * The defense was the product of the defendant. Its sole support was in the evidence of the defendant. This is not a case of mere conflict in the evidence. The defendant attempted by evidence extraneous to the main issue as developed by the prosecution to construct a defense to which he thought death had removed all likelihood of denial."

In *Territory v. Wong,* 30 Haw. 819 (wherein the defendant was charged with attempted bribery), the prosecution's case depended on evidence to the effect (quoting from page 826)

> "that on July 13, 1927 the defendant Wong had a preliminary conversation with Ross in which the proposed bribery was discussed; that on July 18, Wong with Apana and Ah Ping proceeded

in an automobile to the home of Ross at Wailupe, a distance from the center of Honolulu of about seven miles, Wong taking with him the sum of $200.00 in his pockets; that in proceeding to Ross's house, Wong intended to use this money for the purpose of bribing Ross with reference to the unlawful manufacture by Apana of intoxicating liquor; that after some conversation between Wong and Ross in the latter's home, Wong said, 'pull the shade down, I got the money here'; that Wong reached in his pocket and drew therefrom some money; that when Wong said, 'Pull the shade down', Ross went over towards the window to pull the shade down, and just then Charles Cassidy crawled out from underneath the *punee,* an article of furniture upon which Ross and Wong had been sitting. Cassidy was, at the time, a deputy city and county attorney."

Briefly stated, to quote from page 827 of the court's opinion, the defense presented by Wong's testimony was that Ross himself had invited and instigated the bribery.

In *Territory v. Young,* 32 Haw. 628, wherein the defendant was charged with committing the crime of rape, "the theory of the prosecution" (quoting from page 630 of the opinion of the court)

"was that the assault was committed on March 12, a few minutes before midnight. Two doctors testified that they made a physical examination of the prosecutrix shortly thereafter and within the same night and gave testimony tending to show that there had been hemorrhages in her eyes

and abrasions and contusions about her face and neck, indicating in their opinion, that she had been choked or strangled. One of the doctors also gave testimony to the effect that he had made an examination of the perineal region and described the conditions that he found, which taken together with the evidence of force found in her head and neck, tended to show the commission of the crime of rape. The testimony of these two physicians, taken by itself, would have been amply sufficient to support a finding by the jury, if the evidence was believed to be true, that the crime had been committed. In opening, however, the cross-examination of the prosecutrix, defendant's witness said to her, in open court and before the jury, 'We want the world to know, and especially you * * * that on this night of March 12th, you were ravished, raped, assaulted, deflowered, and otherwise ill-treated,' and again during the examination of Dr. F. B. Faus, a witness for the prosecution, defendant by his counsel expressly admitted 'that the prosecuting witness was assaulted that night, forcibly,' and the presiding judge thereupon said, 'I would on that particular point say that the doctor could be informed that he is not here to particularly bear down upon that; the defendant admits it; there is no issue before this jury but that this prosecuting witness was raped on that occasion.'

"* * * there was evidence clearly tending to support the finding that prior to the time of the assault the prosecutrix was acquainted with the defendant. Prosecutrix testified that towards the end of the dance and shortly before midnight, she

walked out with (one) Halm * * * they saw the defendant peeping at them through a hedge; that she became alarmed and with Halm moved to another spot * * * the defendant seized the prosecutrix and by force pulled her away from Halm's hold; that the defendant choked and strangled her, beat her and forced her down to the ground and that she thereupon temporarily lost consciousness; and upon reviving somewhat found that the defendant was in the commission of the act. Her identification of the defendant as her assailant was positive and direct. Halm gave testimony corroborating that of the prosecutrix in respect to the identity of the assailant * * *

"In addition to this direct testimony there was other evidence, circumstantial perhaps, tending to support the view that it was defendant who committed the offense. A pair of trousers with a spot or smear on one knee was introduced in evidence, testified to as having been worn by defendant on the occasion in question and admitted at the trial by the defendant to have been so worn. The prosecution claimed that the smear was a soil from the premises where the assault occurred. The defendant, * * * in his testimony at the trial claimed the smear came from a part of the athletic field at Kamehameha School in this city where, on the afternoon of the same day, March 12, he had lain on the ground. Dr. Hance gave testimony that * * * he had made examinations of three samples of soil, to-wit: that from the place of the assault, that from Kamehameha field, and that from the trousers and that it was his conclusion that the soil from the trousers was

identical in kind with that from the place of the assault and was radically different from that obtained from Kamehameha field.

"There was also testimony of the finding, in a crushed condition, at the place of the assault, within a few minutes after the commission of the assault, of a package of Lucky Strike cigarettes and other testimony that the defendant was in the habit of smoking cigarettes of that kind and none other. There was also testimony that within a few minutes after the commission of the assault two handkerchiefs were found at the place of the assault, similar in kind to four others which were found at the home of the defendant within a few hours after the commission of the offense, and further testimony that prior to the day of the assault the wife of the defendant had bought for him six handkerchiefs of which the four were a part.

"It is true that the defendant, on the witness stand denied the accusation *in toto*. His defense was an alibi; and it is also true that there was other testimony which tended to support the theory of his defense."

In *Territory v. Abellana,* 38 Haw. 532 (a rape case), Mr. Justice Towse, speaking for the court on pages 533 and 534, outlined that portion of the evidence for the prosecution pertinent to a consideration of the question of the propriety of giving the instruction as to the law of "fabricated defenses" as follows:

"* * * The victim of the rape, a fifty-three-year-old woman, in company with the victim of

the robbery, an enlisted member of the United States Army, were walking ewa on the makai sidewalk of South King street in the vicinity of the entrance of the Catholic cemetery at about 6:30 o'clock p. m. Without warning both were confronted by two individuals unknown to them, one in military uniform later identified as Angelino P. Pacheco, Private First Class, United States Army, the other in civilian attire later identified as the defendant-plaintiff in error, hereinafter referred to as the defendant. Pacheco seized Jones' arm, leveled a .45 calibre United States Army automatic revolver at him and ordered him to proceed into the cemetery, the defendant simultaneously seizing Jones' female companion by the arm and also impelling her by force into the cemetery. At a *locus criminis* toward the rear of the cemetery Pacheco forced Jones, at the point of the weapon, to hand over to him the sum of three dollars cash together with his wallet. While this ensued, the defendant by force and against the will of the victim consummated the crime of rape. In doing so he forcibly tore and removed certain of her clothing, and inflicted bodily injuries by way of abrasions to the left upper thigh, scratches upon the left buttock, a blackened right eye, hematoma of the left cheek, contusions of the lips and loss of a tooth. The foregoing was established at trial by exhibits of the victim's false tooth, soiled white blouse together with one detached button, a torn and soiled white slip, a soiled white skirt, and a soiled undergarment. The defendant consummated his assault and ravishing of the victim within several feet and hearing distance of the

helpless escort who could render no aid nor resist the duo as he lay prone and motionless guarded at the point of the weapon by Pacheco.

"Upon consummation of rape, the defendant reversed roles with Pacheco, the weapon being passed from Pacheco to the defendant during the transposition. The defendant continued vigilance over Jones while Pacheco, by force and against the will of the victim, also raped her."

The "fabricated defense" is included in the testimony of defendant detailed by the author of the opinion on pages 546-547 as follows:

"The defendant on direct examination testified that on the day in question and in company with Pacheco he saw the complaining witness and Sergeant Jones near the cemetery; that they had just come from Pacheco's home and were walking toward town on King Street across from the cemetery when Pacheco told him to 'duck in the yard'; that after a while Pacheco told him to go across the street with him and that they thereupon entered the cemetery and were walking through a 'bunch of trees' where the victim and Jones were; that the victim was twelve to fifteen feet away from Jones; that he and Pacheco approached Sergeant Jones and also the victim and asked 'what she was doing in there'; that the victim looked like she had just gotten up or she was looking for something; that he inquired 'what she was doing in there' and 'if she came in there to have intercourse with the soldier,' which she denied; that he then suggested intercourse with her and that she replied 'all right';

that she thereupon voluntarily consummated sexual intercourse with him and assisted him in all respects; that thereafter Pacheco approached him and gave him the weapon and that he went over to Jones who was 'lying down on the ground'; that he only went near Jones but did not 'face the gun on him' but 'faced it away from him'; that when Pacheco upon consummation was walking out with the victim the defendant inquired where they were going to which Pacheco replied that the victim was 'going to get two more girls for us'; that he had returned the gun to Pacheco as Pacheco was returning to the King Street entrance with the victim; that he at no time beat or punched the victim; that she did not 'resist, scream, kick, bite me, or try to push me way'; that the victim had sexual intercourse with him willingly; that he did not know 'at any time' that Pacheco had robbed Jones of any money.

"Upon cross-examination: That at the time he and Pacheco entered the cemetery he did not know Pacheco had a gun. The defendant was accorded opportunity to reconcile prior inconsistent statements, viz.: that he and Pacheco were not at any time in the vicinity of the cemetery on the day in question; that previous to seeing the victim at the police station he had not seen her at any time on the day in question; that he had not seen Jones at any time previous to seeing him at the police station in the early morning of September 23, all of which prior inconsistent statements the defendant failed to reconcile or explain in any degree commensurate with reasonable conformance."

None of the Hawaiian cases or of the cases in other jurisdictions which we have examined goes so far as to say that the instruction complained of would be proper in every criminal case in which the defendant denies the allegations of the indictment.

Three of the five cases in Hawaii merely held that the instruction did not contain the connotation which the defendants gave it. One, the *Truslow* case, went further than any of the others to point out that the defense was, indeed, a fabricated defense and not a mere denial of guilt or of conflict in the evidence. The other, the instant case, brushed aside without a word the contention not theretofore advanced in any prior case before the local Appellate Court but most certainly recognized by that court as the law, that before the instruction complained of could be given there must be interposed a defense that goes further than to merely contradict the government's case; a defense that is "made out of whole cloth", a defense that is "fabricated".

In the case at bar, it was prejudicial error to give the instruction on "fabricated evidence" for that the defendant confined himself to a categorical denial of the charges against him and did not resort to manufacturing a defense as did the defendants in the Hawaiian cases cited by appellee in support of the giving of the instruction complained of. (*Truslow:* a new and modified contract; *Wong:* that the officer had himself invited and instigated the bribery; *Young:*

alibi; and *Abellana:* voluntary submission to sexual intercourse by the prosecutrix who charged rape.)

Dated, Honolulu, Hawaii,
July 11, 1951.

Respectfully submitted,
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